

**UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF ALABAMA**

In re:

Case No. 14-32543-DHW  
Chapter 13

ETHEL L. MCCALL,  
GEORGE R. MCCALL,

Debtors.

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ETHEL L. MCCALL,  
GEORGE R. MCCALL,

Plaintiffs,

v.

Adv. Proc. 15-03009

HOUSEHOLD FINANCE  
CORPORATION OF ALABAMA,  
HSBC MORTGAGE SERVICES, INC.,

Defendants.

**REPORT AND RECOMMENDATION  
OF BANKRUPTCY JUDGE DWIGHT H. WILLIAMS, JR.  
TO THE UNITED STATES DISTRICT COURT FOR  
THE MIDDLE DISTRICT OF ALABAMA**

In this adversary proceeding, the Plaintiffs object to the proof of claim and the notice of postpetition mortgage fees, expenses, and charges filed by the Defendants in the underlying bankruptcy proceeding (Count I). Further, the Plaintiffs allege that the Defendants breached their contract with the Plaintiffs (Count II), made fraudulent misrepresentations (Count III), fraudulently suppressed material facts (Count IV), and violated the Alabama's Deceptive Trade Practices Act (DTPA), Code of Ala. § 8-19-5 (Count V).

The Defendants filed a Motion to Dismiss Counts II-V of the adversary proceeding pursuant to F.R.B.P. 7012(b)(6).<sup>1</sup> There, the Defendants allege that the Plaintiffs' claims are barred by the equitable doctrine of *res judicata* due to a prior decision in the Circuit Court of Autauga County, Alabama. For the following reasons, the undersigned recommends that the district court grant the Defendants' motion to dismiss Counts II-V of the complaint.

## JURISDICTION

The court's jurisdiction in this matter is derived from 28 U.S.C. § 1334 and from an order of The United States District Court for this district wherein that court's jurisdiction in title 11 matters was referred to the Bankruptcy Court. *See* General Order of Reference [of] Bankruptcy Matters (M.D. Ala. Apr. 25, 1985). However, because the claims here do not involve core proceedings under 28 U.S.C. § 157(b)(2) and merely invoke the bankruptcy court's "related to" jurisdiction, this court's jurisdiction does not extend to the entry of a final order or judgment.

## FACTUAL FINDINGS

The Plaintiffs filed the complaint in this adversary proceeding on February 2, 2015. In the complaint, they alleged facts in connection with the origination and repayment of a loan and mortgage entered into by the Plaintiffs and Household Finance Corporation of Alabama (hereinafter "HFC") in July 1996. HSBC Mortgage Services, Inc. (hereinafter "HSBC") is the servicer for the note.

On March 5, 2015, the Defendants filed the Motion to Dismiss the adversary proceeding claiming that the action is barred by the doctrine of *res judicata*. The Defendants asserted that Ms. McCall, as agent for Mr. McCall, had previously filed a complaint in the Circuit Court of Autauga County.<sup>2</sup> The complaint in the state court action asserted breach of contract and fraud in connection with the origination and repayment of the same loan and mortgage. The Circuit Court of Autauga County, Alabama dismissed the complaint holding that the action was barred by the statute of limitations. Mr. McCall appealed the decision, but the

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<sup>1</sup> The court held a hearing on the Motion to Dismiss on March 31, 2015. At the hearing the Defendants indicated that they withdrew the motion with respect to Count I in the complaint.

<sup>2</sup> The court "may consider [] document[s] attached to a motion to dismiss without converting the motion into one for summary judgment if the attached document[s] are] (1) central to the plaintiff's claim and (2) undisputed." *Day v. Taylor*, 400 F.3d 1272, 1276 (11th Cir. 2005). When considering a motion to dismiss based on *res judicata*, the court may take judicial notice of court documents from the state action. *Lozman v. City of Riviera Beach, Fla.*, 713 F.3d 1066, 1075 n.9 (11th Cir. 2013)

Alabama Court of Civil Appeals affirmed the trial court's dismissal of the action on statute of limitations grounds.

### CONCLUSIONS OF LAW

The doctrine of *res judicata* bars not only "claims that were raised in the prior action" but also "claims that could have been raised." *Davila v. Delta Air Lines, Inc.*, 326 F.3d 1183, 1187 (11th Cir. 2003). For *res judicata* to apply to a claim that could have been raised in the prior action the claim must have been "in existence at the time the original complaint [was] filed or [a claim that was] actually asserted . . . in the earlier action. . . . The underlying core of facts must be the same in both proceedings." *In re Piper Aircraft Corp.*, 244 F.3d 1289, 1299-1301 (11th Cir. 2001).

The purpose behind the doctrine of *res judicata* is that the 'full and fair opportunity to litigate protects [a party's] adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.' *Montana v. United States*, 440 U.S. 147, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979).

*Ragsdale v. Rubbermaid, Inc.*, 193 F.3d 1235, 1238 (11th Cir. 1999). In a subsequent federal proceeding, a state court judgment is given full faith and credit so that it receives the same preclusive effect as it would in the courts of the state in which the judgment was determined. *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985) (citing 28 U.S.C. § 1738).

Under Alabama law, "[t]wo causes of action are the same for *res judicata* purposes when the following four elements are satisfied: (1) a prior judgment on the merits, (2) rendered by a court of competent jurisdiction, (3) with substantial identity of the parties, and (4) with the same cause of action presented in both actions." *Chapman Nursing Home, Inc. v. McDonald*, 985 So. 2d 914, 919 (Ala. 2007) (quoting *Equity Res. Mgmt., Inc. v. Vinson*, 723 So. 2d 634, 636 (Ala. 1998) (internal quotation marks omitted)).

Dismissal by a trial court based upon a statute of limitations bar is a judgment on the merits. See *Cagle v. Rubley*, No. 3:14cv04-CSC, 2014 WL 5339314, at \*3 (M.D. Ala. Oct. 20, 2014) (citing *Clothier v. Counseling, Inc.*, 875 So. 2d 1198, 1200 (Ala. Civ. App. 2003) for the proposition that a dismissal based

on statute of limitations is a final judgment on the merits pursuant to Ala. R. Civ. P. 41(b)); *but see Sims v. Geohagan*, 641 So. 2d 1237 (Ala. 1994). Therefore, the decision of the Circuit Court of Autauga County dismissing the complaint based upon the statute of limitations, which was affirmed by the Alabama Court of Civil Appeals, was a final judgment on the merits. As a result, the first element of the doctrine of *res judicata* is met.

Secondly, it cannot be disputed that both courts that rendered the decisions in the previous case are courts of competent jurisdiction. *See Mykins v. Alabama Dept. of Human Resources*, No. 11-0264-WS-M, 2012 WL 6213300 (S.D. Ala. Dec. 12, 2012). The claims asserted, breach of contract and fraud, are state law claims over which the Circuit Court of Autauga County had jurisdiction. Hence, the second element required to apply the doctrine of *res judicata* has been satisfied.

The court turns now to the third element of the doctrine of *res judicata*, and finds that substantially the same parties are involved in the instant adversary proceeding as were involved in the state court action. Neither Ms. McCall nor HSBC were parties in the state court action, however,

“the ‘party identity criterion of *res judicata* does not require complete identity, but only that the party against whom *res judicata* is asserted was either a party or in privity with a party to the prior action or that the non-party's interests were adequately represented by a party in the prior suit, and the relationship between the party and non-party is not so attenuated as to violate due process.’ *Whisman v. Alabama Power Co.*, 512 So.2d 78, 82 (Ala.1987) (citations omitted).”

*Williams v. Moore*, 36 So. 3d 533, 539-40 (Ala. Civ. App. 2008) (quoting *Dairyland Ins. Co. v. Jackson*, 566 So. 2d 723, 725-26 (Ala. 1990). Additionally, “[a] person may be bound by a judgment even though not a party to a suit if one of the parties to the suit is so closely aligned with his interests as to be his virtual representative.” *Green v. Wedowee Hosp.*, 584 So. 2d 1309, 1315 (Ala. 1991) (quoting *Whisman v. Alabama Power Co.*, 512 So. 2d 78, 82-83) (internal quotations marks omitted). Thus, the fact that HSBC was not a party in the state action does not preclude it from asserting a *res judicata* bar against the plaintiffs. Also, while Ms. McCall was a non-party in the state court action, she filed that action as agent for Mr. McCall. Both of the Plaintiffs are mortgagors on the mortgage that secured the loan at issue in both the state court action and

the instant adversary proceeding. Under these circumstances, the interests of Mr. and Ms. McCall are “so closely aligned” that her interests were adequately represented in the state court action. *See Cuauhtli v. Chase Home Finance LLC*, 308 F. App’x 772, 773 (5th Cir. 2009) (determining that a husband and wife relationship is “sufficient for claim preclusion purposes” so that the wife’s prior action concerning the same foreclosure barred the subsequent action by the husband). Therefore, there is substantial identity of parties in the prior state court suit as here, and the third element of *res judicata* is met.

The final element of *res judicata* requires that the same cause of action be brought in both cases. To determine whether the same cause of action element has been met, “[r]es judicata applies not only to the *exact legal theories* advanced in the prior case, but to *all legal theories and claims* arising out of the same nucleus of operative facts.” *Chapman Nursing Home, Inc.*, 985 So. 2d at 921 (quoting *Old Republic Ins. Co. v. Lanier*, 790 So. 2d 922, 928 (Ala. 2000) (emphasis in the original) (citations omitted) (internal quotation marks omitted). Thus, “when the same evidence is applicable in both actions,” then the two causes of action are the same for the purposes of *res judicata* principles. *Id.* In this proceeding, the plaintiffs asserted breach of contract, fraud, fraudulent suppression, and violation of the DTPA. In the state court action, the plaintiffs asserted only the breach of contract and fraud counts. However, the facts alleged in support of the fraudulent suppression and DTPA violations are the same which the plaintiffs assert to support the breach of contract and fraud counts. Additionally, the facts asserted in this adversary proceeding are the same facts that were plead in the state court action. Therefore, all four counts arise out of the “same nucleus of operative facts” so that the fourth element of a *res judicata* defense has been satisfied.

Finally, the Plaintiffs have correctly argued that, under Alabama law, the statute of limitations never bars a compulsory counterclaim, even to the extent that the counterclaim exceeds the claim. In support of that proposition, the Plaintiffs point to *Romar Dev. Co., Inc. v. Gulf View Mgmt. Corp.*, 644 So. 2d 462 (1994).

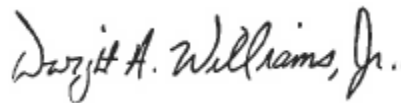
This court, however, is not recommending dismissal of Plaintiffs’ claims on statute of limitations grounds. Instead, the court recommends dismissal of these claims because they have or could have been decided in

a prior action. Hence, the claims are barred by the doctrine of *res judicata*.

### CONCLUSION

For these reasons, the undersigned recommends that the United States District Court grant the Defendants' motion to dismiss Counts II-V of this adversary proceeding under F.R.B.P. 7012(b)(6).

Done this the 30th day of April, 2015.



Dwight H. Williams, Jr.  
United States Bankruptcy Judge

c: Nicholas H. Wooten, Attorney for Plaintiffs  
Ryan J. Hebson, Attorney for Defendants  
Alan Daniel Leeth, Attorney for Defendants